

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
<b>SIDNEY ESIKOFF</b>	:	
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 1989.	:	DETERMINATION
In the Matter of the Petition	:	DTA NOS. 815861
of	:	AND 815862
<b>SIDNEY ESIKOFF AND HELEN ESIKOFF</b>	:	
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 1990.	:	

Petitioners, Sidney Esikoff and Helen Esikoff, 5500 Collins Avenue, Apartment 303, Miami Beach, Florida 33140, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1989 and 1990.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 20, 1998 at 10:15 A.M., and continued to conclusion at the same offices on July 2, 1998 at 10:15 A.M. with all briefs to be submitted by December 30, 1998, which date began the six-month period for the issuance of this determination. Petitioners appeared by Margolin, Winer & Evans, LLP (Frederick N. Bruckner, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Gary R. Palmer, Esq., of counsel).

## ***ISSUES***

I. Whether petitioner, Sidney Esikoff, was domiciled in the State of New York in 1989 and thus taxable as a New York State resident individual during the year 1989 and whether petitioners, Sidney and Helen Esikoff, were domiciled in the State of New York in 1990 and thus taxable as New York State resident individuals during the year 1990.

II. Whether petitioners, if not domiciled in New York State during the respective years at issue, maintained a permanent place of abode and spent more than 183 days of each year in New York State and were therefore taxable as New York State resident individuals.

III. Whether the Division of Taxation erroneously asserted that personal income tax was due on New York State municipal bond interest for the year 1990.

IV. Whether penalties asserted by the Division of Taxation pursuant to Tax Law § 685(b) and (p) should be abated because the failure was due to reasonable cause and not due to willful neglect.

## ***FINDINGS OF FACT***

### ***Background***

1. On the basis of an audit of the personal income tax returns of petitioner Sidney Esikoff, the Division of Taxation (“Division”) concluded that Mr. Esikoff was a domiciliary and statutory resident of the State of New York for the years 1987 and 1988. The Division asserted a deficiency of personal income tax only for the year 1988 because 1987 was barred by the statute of limitations. Initially, Mr. Esikoff challenged the determination. However, he subsequently executed a consent to the notice because he did not have any documentation regarding the number of days spent in New York. Mr. Esikoff paid the tax due under protest and did not file a claim for a refund. Thereafter, petitioners’ representative, Frederick N. Bruckner, Esq., provided

additional documentation to the Division and asked for a determination of whether Mr. Esikoff had adequately documented a change of domicile.

2. Following an audit, the Division concluded that petitioners had not presented clear and convincing evidence that they changed their domicile from New York to Florida for the years 1989 and 1990. Alternatively, the Division found that petitioners were statutory residents for the same two years.

3. The Division issued a Statement of Audit Changes, dated July 20, 1994, to Sidney Esikoff which, to the extent remaining in issue, explained that the Division deemed Mr. Esikoff to be taxable as a domiciliary or statutory resident of New York for the year 1989. The Statement further explained that penalties were due pursuant to Tax Law § 685(b) for negligence and Tax Law § 685(p) for substantial understatement of liability. The Division also issued a Statement of Personal Income Tax Audit Changes to Sidney and Helen Esikoff, dated July 20, 1994, which similarly explained that petitioners were deemed to be taxable as domiciliaries or statutory residents of New York for the year 1990. The Division further concluded that certain claimed tax exempt bond interest income was subject to New York State personal income tax. Mr. Esikoff was assessed for claimed tax exempt interest in 1990 because the Division did not receive any documentation to support the asserted tax exempt status of the bond interest.<sup>1</sup> The statement also explained that penalties were asserted for the year 1990 pursuant to Tax Law § 685(b) for negligence and Tax Law § 685(p) for substantial understatement of liability.

4. The Division issued a Notice of Deficiency, dated October 7, 1994, to Mr. Esikoff which stated that tax was due for the year 1989 in the amount of \$28,279.23, plus interest in the

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<sup>1</sup>The Division also asserted that tax was due on the claimed tax exempt bond interest for the year 1989. However, this issue was resolved between the parties during a recess in the hearing.

amount of \$11,347.98 and penalty in the amount of \$9,915.87, less payments or credits in the amount of \$1.86 for a balance due of \$49,541.22. The Division also issued a Notice of Deficiency, dated October 7, 1994, to Helen P. Esikoff and Sidney Esikoff which stated that tax was due for the year 1990 in the amount of \$22,908.66, plus interest in the amount of \$6,284.35 and penalty in the amount of \$6,578.47, for a current balance due of \$35,771.48.

5. The Bureau of Conciliation and Mediation Services issued a Conciliation Order, dated March 7, 1997, which reduced the amount of tax asserted to be due from Mr. Esikoff for the year 1989 to \$18,402.48 plus the previously asserted penalties and interest computed at the applicable rate. A second Conciliation Order did not make any adjustment to the notice issued to Sidney and Helen P. Esikoff for the year 1990.

### ***Tax Filing History***

6. The last year in which Mr. Esikoff filed as a resident of the State of New York was 1986. The last year in which Helen Esikoff filed as a resident of the State of New York was 1987.

7. Petitioner Sidney Esikoff filed a New York State Nonresident and Part-Year Resident Income Tax Return for the year 1989. The first page of the return listed Mr. Esikoff's address as 2580 South Ocean Blvd., Palm Beach, Florida. Question E on the first page of the return was addressed to nonresidents and asked "[d]id you or your spouse maintain living quarters in New York State in 1989?" There was no response to this question on the return. Mr. Esikoff allocated a portion of his income to sources outside of New York State. He also reported income and expenses from various commercial properties on a Supplemental Income Schedule. One of the expenses claimed by Mr. Esikoff was for travel and entertainment in the amount of \$30,954.00. The tax return included W-2P forms from Dean Witter Reynolds, Inc., Custodian

and The Capital Life Ins. Co. c/o Security First Group. Each W-2P form listed Mr. Esikoff's address as 141-40 Union Turnpike, Flushing, NY.

8. Petitioners, Sidney and Helen Esikoff, filed a joint New York State Nonresident and Part-Year Resident Income Tax Return for the year 1990. On this return, petitioners listed their address as 5500 Collins Avenue, Apartment 303, Miami Beach, Florida 33140. The "No" box was checked in response to the question of whether petitioners maintained living quarters in New York State. Petitioners allocated a portion of their income to sources within New York State. Their return included W-2P forms from The Capitol Life Ins. Co. c/o Security First Group and Dean Witter Reynolds, Inc., Custodian. Each of the W-2P forms was addressed to Mr. Esikoff at 141-40 Union Turnpike, Flushing, NY.

9. Mr. Esikoff filed a Florida Individual & Fiduciary Intangible Tax Return for the years 1988, 1989 and 1990. His address was listed as 3440 South Ocean Boulevard, Palm Beach, Florida on the returns for 1988 and 1989. The return for 1990 listed Mr. Esikoff's address as 2580 South Ocean Boulevard, Palm Beach, Florida 33480. Mr. Esikoff does not recall the first year he filed a Florida individual and fiduciary intangible tax return.

10. Property taxes were paid on the Florida home for the year 1990. During the audit, Mr. Esikoff established that he obtained a Florida homestead exemption in 1990.

### ***Residences***

11. During the period June 1980 through September 1982, Mr. Esikoff lived in one of two residences. Mr. Esikoff resided with his first wife, Freda Esikoff, in a condominium located at 12 Bond Street, Apartment 3, Great Neck, New York. This condominium was owned by Freda Esikoff. He also resided with Freda Esikoff at 3440 South Ocean Boulevard, Apartment S707, Palm Beach, Florida.

12. In September 1982, Mr. Esikoff acquired and began residing at apartment S403, 3440 South Ocean Boulevard, Palm Beach, Florida. Apartment S707, at the same address, was sold in 1983.

13. On July 1, 1987, Freda Esikoff transferred the condominium at 12 Bond Street, Great Neck, New York to an irrevocable trust known as the Freda Esikoff Family Trust for the benefit of her grandchildren. The apartment at 12 Bond Street was valued at \$669,000.00 in an addendum to the document which created the trust.<sup>2</sup> The trust was also funded with cash in the amount of \$1,000.00. The trust continued to own the apartment during the years 1989 and 1990. The trust paid the telephone bills, electric bills and expenses for usual routine upkeep with funds deposited from the personal checking account of Mr. Esikoff at the Chase Manhattan Bank.

Initially, Mr. Bruckner told the Division during the audit that the apartment at 12 Bond Street was set up in an irrevocable trust for the benefit of the grandchildren and used by the grandchildren. Mr. Bruckner also stated that Mr. Esikoff and his wife stayed with their children when they visited New York. After the Division examined the checking account and determined that the trust was funded primarily by Mr. Esikoff's own funds, Mr. Bruckner wrote a statement which explained that Mr. Esikoff and his wife stay primarily at 12 Bond Street when they are in New York.<sup>3</sup>

14. Freda Esikoff died on August 23, 1987. At the time of her demise, Mr. and Mrs. Esikoff were staying at 12 Bond Street. Prior to her death, Mr. and Mrs. Esikoff were traveling

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<sup>2</sup> On April 13, 1988, the executor of the estate of Freda Esikoff executed a United States Gift Tax Return which listed the gift of the apartment at 12 Bond Street. The return stated that the date of the gift was July 1, 1987 and that the value of the apartment was \$550,000.00.

<sup>3</sup>At this time, the Division also learned that Helen Reid, who became Mr. Esikoff's wife after Freda Esikoff died, stayed at 104-60 Queens Blvd. prior to moving to 12 Bond Street and that she had a practice of going to Florida from September to April during the years 1987, 1988 and 1989.

in Europe and she became ill. Mr. Esikoff brought her back to New York because that was where they went in the summertime. Freda Esikoff was buried in New York.

15. In September 1987, Mr. Esikoff began residing with his second wife to be, Helen Reid, in her Florida apartment. This apartment was located at 5600 Collins Avenue, Apartment 8S, Miami Beach, Florida.<sup>4</sup> Mr. Esikoff spent nearly all of his time while in Florida at the 5600 Collins Avenue apartment. However, he continued using his condominium at 3440 South Ocean Boulevard, Apartment S403, Palm Beach, Florida when he was not using Helen Reid's apartment.

16. In May 1989, Mr. Esikoff purchased a condominium at 2580 South Ocean Boulevard, Palm Beach, Florida with the intention that it would become his and Helen Reid's new residence. Nevertheless, petitioners did not reside in this apartment and it was sold on November 30, 1989 for \$375,000.00. The Form 2119 used to report the sale stated that the basis of the home was \$550,000.00.

17. In October 1989, Mr. Esikoff sold the condominium at 3440 South Ocean Boulevard, Apartment S403, Palm Beach, Florida.

18. On April 17, 1990, Mr. Esikoff married Helen Reid.

19. In November 1990, the lease at 5600 Collins Avenue, Apartment 8S, Miami Beach, Florida terminated and Mr. and Mrs. Esikoff purchased a condominium at 5500 Collins Avenue, Apartment 303, Miami Beach, Florida. Between October 1989 when he sold his Palm Beach condominium at 3440 South Ocean Boulevard and November 1990 when he purchased the

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<sup>4</sup>On July 22, 1985, Helen P. Reid entered into a lease for an apartment at 5600 Collins Avenue, Miami Beach, Florida. The term of the lease was from November 1, 1985 to October 31, 1988. The lease contemplated the occupancy by no more than one adult. Helen Reid resided in this apartment from approximately 1986 until she moved to the 5500 Collins Avenue apartment in Miami which she purchased together with Sidney Esikoff in 1990 (*see*, Finding of Fact "19").

Miami Beach condominium at 5500 Collins Avenue, Mr. Esikoff did not own any condominiums in Florida that he lived in. During this period of time he resided at 5600 Collins Avenue, Apartment 8S.

20. The total investment in the condominium at 2580 South Ocean Boulevard, Palm Beach was \$550,000.00 and an additional \$150,000.00 for its contents. The apartment at 5500 Collins Avenue, Miami Beach was purchased for \$360,000.00 with subsequent improvements of approximately \$140,000.00. These expenses did not include closing costs.

***Business Relationships***

21. Mr. Esikoff utilized an entity known as Realty Unlimited, located at 141-40 Union Turnpike, Flushing, New York, as a vehicle to manage his business interests. The real property was owned by Mr. Esikoff. Realty Unlimited maintained a bank account at Chase Manhattan Bank. During the years in issue, Realty Unlimited relied upon the services of Paula Molinaro who ran the office of Realty Unlimited on a daily basis. Paula Molinaro was responsible for maintaining and preparing records for the accountants. She also prepared checks and handled collections and disbursements. Mr. Esikoff's son-in-law, Robert Havasy, was responsible for new construction and development projects and provided some assistance to Ms. Molinaro. If Mr. Esikoff had not hired Robert Havasy, he would have had to spend more time at the offices of Realty Unlimited. However, he did not want to do this because he wished to be semi-retired and live outside of New York. Mr. Esikoff, Paula Molinaro and Robert Havasy had their own desks at the office. Nearly every month, Mr. Esikoff went to the office several times. While at the office, he would check for messages and tasks which had to be performed. Mr. Esikoff would be in the office from two to five hours on each occasion depending upon what had to be done.

22. According to a letter dated December 6, 1990, Ms. Molinaro stated that she "was hired



to ultimately relieve Mr. Esikoff of the requirement to be here on a day-to-day basis. Our objective was reached as during the last five (5) years, Mr. Esikoff has been in the office on an average of five (5) to six (6) days/month.” (Petitioner’s exhibit “22.”) In a memorandum dated January 5, 1993 to Mr. Esikoff’s representative, Mr. Brucker, Ms. Molinaro stated:

As Mr. Esikoff’s bookkeeper and office manager, I maintain the above checkbooks [Mr. Esikoff’s 1989 and 1990 personal checkbooks] in New York. Monthly, I prepare all checks for invoices to be paid and forward same with supporting documentation to Mr. Esikoff in Florida. He reviews same, signs and returns to me for mailing and posting. (Petitioners’ exhibit “22.”)

23. Mr. Esikoff did not allow Ms. Molinaro to sign checks because he liked to review and approve the payments. After Ms. Molinaro prepared the checks, she would send them to Mr. Esikoff for his signature. If Mr. Esikoff concluded that changes were needed, he would ask Ms. Molinaro to send a corrected check. Ms. Molinaro postdated the checks to correspond with when funds would be available. Ms. Molinaro became sick in the summer of 1997 and Mr. Esikoff’s daughter, Ms. Jane Perlow, became involved and started to help. After Ms. Molinaro passed away in late 1997, Ms. Perlow assumed the position occupied by Ms. Molinaro. Mr. Esikoff allows Ms. Perlow to sign checks.

24. Realty Unlimited maintained a checking account at Chase Manhattan Bank. During the years in issue, it was Mr. Esikoff’s practice to leave the checkbook for Realty Unlimited at the company’s office. On rare occasions, he would take the checkbook with him.

25. Mr. Esikoff had an interest in the following businesses and reported income or loss as follows:

Type of Entity	Percentage Ownership	Entity	Passive or Non-passive Income or Loss	Activity	Tenant (If applicable)
			1989	1990	

Partnership	50	Bond Realty Associates	Passive Income	Passive Income	Rental Real Estate	Dentists' Offices
Partnership	36.67	KES Realty Co.	Passive Income	Passive Income	Rental Real Estate	Highland Care Center
Partnership	29	SKEK	Passive Income	Passive Income	Rental Real Estate	Flushing Manor Care Center
Partnership	50	Esikoff & Finkelstein	Passive Income	Passive Income	Rental Real Estate	Gasoline station
Partnership	9.79	Wayland Properties	Passive Loss	Passive Loss	Rental Real Estate	Tax Shelter
Partnership		Esikoff & Estate of Tanner	Passive Income	Passive Income	Rental Real Estate	Gasoline station
Partnership	36.70	Highland Care Center	Non-passive income	Non-passive loss	Nursing Home	
Partnership	46.77	Little Neck Nursing Home	Passive Income	Passive Income	Nursing Home	Little Neck Nursing Home
Partnership	42.54	LNNH Associates	Passive Income	Passive Income	Rental Real Estate	
Subchapter S	100	HPSE Realty Corp.	Passive Loss	Passive Loss	Rental Real Estate	Residential Condominium Unit
Subchapter S	90	J. Royal Parker Assoc. Inc.	Non-passive Income	Non-passive Loss	Engineering Firm	

26. In addition to the foregoing, Mr. Esikoff owned six parcels of rental real estate on which gasoline stations were situated and one parcel of real estate on which an office was located.

27. Bond Realty Associates was a firm that owned offices that were rented to dentists. The dentists' offices were located at 12 Bond Street, Great Neck, New York. Mr. Esikoff was a general partner of this firm.

28. KES Realty Co., 141-40 Union Turnpike, Flushing, New York 11367, was a

partnership of three individuals who had an approximately equal ownership interest in the company. KES Realty rented the nursing home to Highland Care Center which was in Jamaica. The partners had input as to the amount of rent that KES received.

29. SKEK Associates, 141-40 Union Turnpike, Flushing, New York 11367, was the owner of Flushing Manor Care Center in Flushing, New York. Mr. Esikoff was a general partner of this firm. The partners of SKEK Associates had input as to the amount of rent that SKEK Associates received.

30. Mr. Esikoff was a general partner of Esikoff & Finkelstein which was located at 12 Bond Street, Great Neck, New York 11021. The firm held the mortgage on a service station in Queens, New York.

31. The mailing address of Wayland Properties was Wayland Properties c/o Weiss, Box 523, Nesconset, New York 11767. A schedule K-1 for 1989 states that Mr. Esikoff was not a general partner of Wayland Properties.

32. Mr. Esikoff was a general partner of a partnership which owned a nursing home known as Highland Care Center located at 91-31 175<sup>th</sup> Street, Jamaica, New York 11432. On his income tax returns, Mr. Esikoff reported that he had nonpassive income of \$56,004.00 in 1989 from Highland Care Center and a nonpassive loss from the same entity in 1990 of \$39,594.00. During the years in issue, Highland Care Center was leased to a partnership and run by an administrator. Mr. Esikoff was neither employed by nor did he receive a salary from Highland Care Center. The level of Mr. Esikoff's work involvement with Highland Care Center was the same as his involvement with Little Neck Nursing Home. Mr. Esikoff believes that it was an error to characterize his activity in Highland Care Center as nonpassive on the tax returns.

33. During the years 1981 through 1989 Jane Perlow was the assistant administrator of

Highland Care Center. She was also the licensee of the Highland Care Center until a transfer of ownership occurred in 1989.

34. On a daily basis, the operation of the Highland Care Center was handled by the administrator or assistant administrator. Ms. Perlow signed all accounts payable and payroll. The owners attended board meetings and examined requirements of the Department of Health. Mr. Esikoff's only involvement was limited to collecting rent.

35. Mr. Esikoff was a general partner of Little Neck Nursing Home ("Little Neck") which was located at 260-19 Nassau Blvd., Flushing, New York 11362. Mr. Esikoff's name was on the license and therefore, he was accountable for the actions of the employees. Including Mr. Esikoff, there were five members on the board of directors of Little Neck. However, Mr. Esikoff did not become involved in the daily operations of the business of the nursing home which was the responsibility of the licensed administrator, medical director and director of nursing.

36. Mr. Esikoff had one or two meetings a year with the other four members of the board of directors of Little Neck Nursing Home in order to determine whether legal requirements were satisfied. Mr. Esikoff would not have been able to change administrators at Little Neck without the approval of the majority of the board of directors. The board of directors would have to notify the State if something improper were occurring at the nursing home. The licensed administrator answered to Mr. Esikoff and his partners.

37. LNNH Associates was the owner of the real property on which Little Neck operated the nursing home. Mr. Esikoff was a general partner of this firm which was located at 260-19 Nassau Blvd., Flushing, New York 11367.

38. HPSE Realty Corp., c/o Cooper, Selvin & Strassberg, 415 Northern Blvd., Great Neck, New York 11021, was a corporation which owned a condominium at 12 Bond Street, Great Neck,

New York.

39. J. Royal Parker Associates was a New Jersey engineering company which performed services for firms engaged in the chemical, petrochemical and petroleum industries. The principal office was located in Cherry Hill, New Jersey. It also had a New York affiliate. When Mr. Esikoff performed services for this firm, it was done in Cherry Hill, New Jersey. On these days, Mr. Esikoff stayed at the home of the company's president which was in Haddonfield, New Jersey.<sup>5</sup> Mr. Esikoff had nonpassive income of \$65,544.00 in 1989 and a nonpassive loss of \$19,348.00 in 1990. He owned 90 percent of the stock of J. Royal Parker Associates which was organized as a small business corporation.

40. H.P. Reid Co., Inc. was a New Jersey corporation. Since its inception in 1981, Mr. Esikoff served as an unpaid consultant to the corporation on behalf of the shareholding interests of Helen P. Reid Esikoff. In the course of his services, he spent time as the house guest of the president of the corporation, V.A. Lichter, who resided at 619 Valley Road, Brielle, New Jersey 08730.<sup>6</sup>

41. Mr. Esikoff was a general partner of Esikoff & Tanner, 141-40 Union Turnpike, Flushing, New York 11367.

42. Mr. Esikoff owned 38 percent of the stock of a corporation known as Stone Hill, Inc. which owned property in North Hills, New York.

43. In 1989 or 1990, Mr. Esikoff worked with an architect, Mr. Allen Feinberg, to

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<sup>5</sup>The president of J. Royal Parker Associates stated that it was Mr. Esikoff's practice to spend three or four days a month in Cherry Hill, New Jersey. This statement is rejected as unreliable since it does not correspond with other evidence in the record such as petitioners' bill of particulars (*see*, Finding of Fact "91").

<sup>6</sup>The president of H.P. Reid Co., Inc. stated that Mr. Esikoff spent approximately one day a month as his house guest. This statement is also rejected as unreliable since it does not correspond with other evidence in the record such as petitioners' bill of particulars (*see*, Finding of Fact "91").

redesign nursing homes. The architect's office was located in Forest Hills, New York. In 1990, Mr. Feinberg performed work designing and making an application for a certificate of need for a nursing home. Mr. Esikoff was partner with a few others on this project.

***Indicia of intent to remain a New York domiciliary***

44. During the years in issue, two telephones were maintained at the 12 Bond Street apartment. The 1989 telephone directory for Nassau, New York listed 482-3910 for Sidney Esikoff and 482-3911 for Freda Esikoff. The same numbers were listed for Sidney Esikoff and Freda Esikoff, respectively, in the 1990 telephone directory. When they were in New York, Mr. Esikoff and his wife stayed primarily at the 12 Bond Street condominium.

45. During the years in issue, Mr. Esikoff maintained a personal bank account at Chase Manhattan Bank in New York City.

46. Mr. Esikoff received statements showing the receipt of interest income at 141-40 Union Turnpike, Flushing, New York for the year 1989 from the following institutions: (a) The Chase Manhattan Bank, N.A. in New Hyde Park, New York (b) Island National Bank of Palm Beach, Florida (c) National Westminster Bank in Great Neck, New York (d) BankAtlantic of Fort Lauderdale, Florida (e) Dean Witter Reynolds Inc. of New York, New York and (f) Paine Webber Resource Management Account.<sup>7</sup>

47. In the course of the audit, the Division sent a certified mailing to Mr. Esikoff at 2580 South Ocean Blvd., Palm Beach, Florida 33480. Notations on the return receipt card show that the South Ocean Boulevard address was crossed out and delivery was made to 141-40 Union Turnpike, Flushing, New York.

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<sup>7</sup>The location of the Paine Webber office is not set forth on the statement.

48. Various tax documents (e.g., Form 1099 - DIV or Form 1099 - MISC) issued to Helen P. Reid for the year 1990 were addressed to 141-40 Union Turnpike, Flushing, New York.

49. In or about March 1963, Mr. Esikoff became a member of the Muttontown Golf and Country Club, Inc. ("The Muttontown Club") of East Norwich, New York. At the time of the application, Mr. Esikoff resided at 82-38 213<sup>th</sup> Street, Queens Village, New York. Mr. Esikoff remained a member of the club during the years in issue. The monthly bills from The Muttontown Club were sent to Mr. Esikoff at 141-40 Union Turnpike, Flushing, New York.

50. In the course of its audit, the Division found a checking account bank statement, dated May 5, 1989, issued by The Chase Manhattan Bank, NA to Mr. Esikoff at 141-40 Union Turnpike, Flushing, New York. It also found two bank statements issued by the Island National Bank of Palm Beach to Sidney Esikoff or Helen Reid Esikoff at 141-40 Union Turnpike, Flushing, New York.

51. Sidney Esikoff maintained a homeowner's insurance policy with Royal Insurance on 12 Bond Street, Unit P-3, Great Neck, New York. The copy of the insurance policy offered into evidence was effective for the period April 2, 1988 through April 2, 1989. Mr. Esikoff's mailing address was listed as 141-40 Union Turnpike, Flushing, New York and an additional location for the insured was listed on the insurance policy as 3440 South Ocean Boulevard, #S-403, Palm Beach, Florida. The schedule of fine arts included with the insurance policy had a total value of \$326,200.00. Mr. Esikoff also maintained a personal floater policy on the fine arts at the Great Neck location for the period May 8, 1989 through May 8, 1990 with the Norstern Insurance Company of America. The invoice for the personal floater policy placed a value on the fine arts at \$634,800.00 on the basis of an appraisal dated April 18, 1989. The invoice further stated that "[t]he named insured and the mailing address is amended to read as follows [:] Sidney Esikoff,

Freda Esikoff Family Trust, 12 Bond Street 'Penthouse 3', Great Neck, N.Y. 11021.'" (Division's Exhibit "DD.")

52. Mr. Esikoff had a frequent flier account with Pan American Airlines through a program known as Pan Am Worldpass. The September 1990 statement on Mr. Esikoff's account was sent to 12 Bond Street, Great Neck, New York.

53. On April 6, 1989, Sidney Esikoff executed, as a guarantor, a Vehicle Net Lease Agreement on behalf of Realty Unlimited wherein Sparta Auto & Truck Leasing Corp. agreed to provide an automobile to Realty Unlimited located at 141-40 Union Turnpike, Queens, New York for a term of 36 months.

54. In the course of the audit, the Division examined a group of invoices for airplane tickets from Jeffery's World of Travel, Ltd. of Great Neck, New York. With the possible exception of one invoice which was not completely legible, each of the invoices examined by the Division was sold to Sidney Esikoff and each invoice listed the 12 Bond Street, Great Neck, New York address.

55. Sidney Esikoff had a New York driver's licence which was valid for the four years ending December 31, 1992.

56. The Division reviewed a form W-2P for the year 1989 issued by The Capitol Life Ins. Co. of Los Angeles, California to Sidney Esikoff at 141-40 Union Turnpike, Flushing, New York.

57. During the audit, the Division reviewed checks drawn on the Island National Bank of Florida. The checks were for items such as Florida Power and Light, the Condominium Association, Southern Bell, insurance, and general expenses for the condominium. The Division did not make copies of the checks it reviewed because they did not establish a pattern of living in



Florida. Following its examination, the Division concluded that there were no checks for food, clothing or gasoline that were indicative of a lifestyle in Florida.

58. Petitioners' automobiles were insured with the Royal Insurance Company of America. The premium notices were mailed to 141-40 Union Turnpike, Flushing, New York. The policy was obtained from Kingsbrook Brokerage Service Inc., 160 Broadway, New York, New York.

59. Mr. Esikoff utilized the services of various doctors, lawyers and a dentist who were located in New York during 1989 and 1990.

60. At least two couples with whom Mr. and Mrs. Esikoff socialized in Florida also had a summer residence in New York.

61. Mr. Esikoff acquired golf clubs from Golf Purchase Corporation of Great Neck, New York on July 1, 1989. The back of the check listed two addresses and corresponding phone numbers. The addresses listed were 141-40 Union Turnpike, Flushing, New York and 12 Bond Street, Great Neck, New York.

62. Mr. Esikoff has three daughters. In 1989 and 1990, all three of the daughters were married and lived in New York.

63. In 1989 or 1990, Mr. Esikoff maintained safe deposit boxes at New York banks.

64. Petitioners received a letter dated July 16, 1990 from a law firm in Miami, Florida concerning their proposed purchase of a condominium in Florida. The letter was addressed to Mr. and Mrs. Esikoff at 141-40 Union Turnpike, Flushing, New York 11367.

***Indicia of intent to acquire a Florida domicile***

65. On April 1, 1985 Mr. Esikoff executed a Declaration of Domicile which stated that in January 1982 he became a bona fide resident of the State of Florida and that he resided at 3440 South Ocean Boulevard in the City of Palm Beach.

66. Mr. Esikoff had Florida driver's licenses for the periods January 1982 through December 1985, December 1985 through December 1991, and December 1991 through December 1997. The Florida driver's licenses were valid only in the State of Florida.

67. In the course of the audit, the Division reviewed a Form 1099-R for the year 1989 issued by the Highland Care Center Inc. of Jamaica, New York to Sidney Esikoff at 4310 South Ocean Blvd., Palm Beach, Florida.

68. Voter registration I.D. cards show that Helen Esikoff has been registered to vote in Florida since July 22, 1988. Mr. Esikoff has been registered to vote since at least February 20, 1991.<sup>8</sup>

69. On August 6, 1990, Mr. Esikoff executed a will before a notary public in the State of Florida. The first paragraph of the will stated "I, SIDNEY ESIKOFF, residing and domiciled at 5600 Collins Avenue, Miami Beach in the County of Dade and State of Florida make, publish and declare this to be my last will and testament. . . ." (Petitioners' exhibit "5.") Paragraph 19(a) of the will provided, in part, that the fiduciary acting under the will shall have the power, authority and discretion conferred upon fiduciaries by the laws of the State of Florida. On the same day, Mr. Esikoff executed a First Codicil to the Last Will of Sidney Esikoff. The first paragraph of the codicil stated "I, SIDNEY ESIKOFF, residing and domiciled at 5600 Collins Avenue, Miami Beach, in the County of Dade, in the State of Florida, make publish and declare this to be the first Codicil to my Last Will and Testament. . . ." (Petitioners' exhibit "26.") Another section of the codicil referred to a condominium which Mr. Esikoff owned jointly with his wife, Helen Reid Esikoff, at 5500 Collins Avenue, Tower House 303, Miami Beach, Florida

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<sup>8</sup>At the hearing, petitioners' representative asserted that Mr. Esikoff had a voter registration card for earlier years but he could not find it.

which was purchased for \$360,000.00.

70. Sidney Esikoff and Helen P. Reid were married in Las Vegas on April 17, 1990. The marriage certificate listed Mr. Esikoff's residence as Palm Beach, Florida and Helen P. Reid's residence as Miami, Florida.

71. In or about January 1986, Mr. Esikoff and his then wife, Freda, applied for membership to The Falls Country Club which was located near Palm Beach. The subscription agreement listed Sidney and Freda Esikoff's address as 3440 South Ocean Blvd., Palm Beach. Mr. Esikoff was also a member of the Boyton Beach Municipal Golf Club of Boyton Beach, Florida, the Bayshore Municipal Golf Club of Miami Beach, Florida, and the Westview Country Club of Miami Beach, Florida.

72. Mr. Esikoff utilized the services of a number of different doctors, attorneys and a dentist who were located in Florida.

73. Mr. Esikoff had numerous friends in Florida.

74. The audit report of the Division shows that Mr. Esikoff leased a 1985 Jaguar from March 15, 1985 through February 20, 1989. At the conclusion of the lease, he purchased the automobile. The lease agreement provided that the car would be principally garaged in Florida and has been registered in Florida since 1985. The address of the leasing company was 111 Great Neck Road, Great Neck, New York 11201 and the car was purchased from All Metro Car Leasing Inc., 272 North Franklin Street, Hempstead, New York.

75. During the audit, the Division examined automobile insurance policies for the period December 12, 1989 through June 12, 1990 and June 12, 1990 through December 12, 1990. In each instance, the policies insured a 1989 Lincoln Town Car and a 1985 Jaguar sedan. Both policies stated that the automobiles were to be garaged in Palm Beach, Florida. Helen Reid also

owned a 1987 Chevrolet that had a Florida title since July 7, 1987.

76. Freda Esikoff died on August 23, 1987. The United States Estate (and Generation-Skipping Transfer) Tax Return stated that Freda Esikoff was domiciled at 3440 South Ocean Boulevard, Palm Beach, Florida 33480. The schedule of real estate listed the residence at 3440 South Ocean Boulevard, Palm Beach, Florida and placed the value at the date of death at \$550,000.00.

77. Mr. Esikoff was motivated to change his domicile to Florida by his first wife's ill health and by the fact that she liked being in Florida. Mr. Esikoff also enjoyed the warm weather and wanted to spend time with his friends in Florida. The tax advantages of being a Florida resident were also a contributing factor to his desire to change domicile.

78. At the hearing, Mr. Esikoff explained that he considered 5500 Collins Avenue to be his permanent home because that was where he spent most of his time and was where his interests were. He also explained that he did not consider himself to have any attachment to the condominium at 12 Bond Street, except for the fact that his family lives there because his wife owned it and not him. He believed that his home was in Florida.

79. During the years in issue, Mr. Esikoff received mail, including certain tax documents, in Florida.

80. The audit report of the Division shows that Mr. Esikoff maintained bank accounts at two Florida banks: Island National Bank and Island Preferred Bank.

***Days in and out of New York - 1989***

81. According to the Division's records, petitioners did not submit a diary for 1989 for examination. On the basis of a review of checking account statements, canceled checks, American Express documents, travel records, invoices from The Muttontown Club and any other

information that was available, the Division concluded that in 1989 petitioner spent 188 days in New York, 56 days in Florida, 113 days unknown, and 8 days out of the country.

82. At the hearing, petitioners' representative maintained that Mr. Esikoff's diary for 1989 was given to the Division and not returned. Petitioners' representative stated that he first realized that the 1989 diary was not returned when he received the demand for a bill of particulars requesting a breakdown of the number of days spent in New York and he determined that he did not have any documents for 1989.

83. The record shows that the Division served a Demand for a Bill of Particulars, dated August 7, 1997, upon petitioners' representative. The third paragraph of the demand requested "[a] specification of each day during 1989 and 1990 which said petitioner spent no part of within the State of New York, or, in the alternative, specify each day during said years that said petitioner spent any part of within the State of New York." (Divisions' exhibit "I.")

84. In response to the bill of particulars, petitioners alleged, among other things:

3. *1989*

The Audit Division issued an information request dated December 10, 1993, a copy of which is annexed hereto, requesting, among various items, Item 6, Mr. Esikoff's original 1989 diary or day by day breakdown of days. After continuing the audit at petitioners' representative's place of business on April 12, 1994 and April 13, 1994, the Audit Division issued a schedule dated April 13, 1994 entitled 'Still Missing from 12/24/93 Letter', a copy of which is annexed hereto.

As can be seen, the Audit Division made no reference in its 'Still Missing from 12/24/93 Letter' that it was still missing Item 6, Mr. Esikoff's original 1989 diary or day by day breakdown of days. The natural conclusion to be drawn is that the Audit Division was furnished with Mr. Esikoff's original 1989 diary of day by day breakdown of days during the audit of April 12, 1994 and April 13, 1994.

After a due and diligent search, petitioners' representative cannot locate Mr. Esikoff's original 1989 diary or day by day breakdown of days and petitioners' representative believes that the same were given to the Audit Division and not returned. Accordingly, in the absence of the above, petitioners cannot make any further response to this item for 1989. (Division's exhibit "J.")

85. In his testimony at the hearing, Mr. Bruckner explained:

I can only surmise, because I don't have a perfectly accurate recollection, all I have is in reviewing the record, that it seems that it was submitted. It seems clear that it was no longer asked for and I just don't have it. So it is very peculiar that this document is no longer in my possession and it was asked for by the state in its demand for a bill of particulars. I can't supply it because I don't have it. (Tr., p. 225.)

86. At the hearing, Mr. Esikoff could not recall whether he kept a diary for 1989.

87. Petitioners' representative never analyzed the 1989 diary or called the Division's representative to inquire as to where the diary was. Petitioners' representative did not know how many days Mr. Esikoff spent in New York in 1989.

***Days in and out of New York - 1990***

88. On the basis of a review of checking account statements, canceled checks, American Express documents, travel records, taxpayers' diary for 1990, and The Muttontown Club invoices, the Division concluded that in 1990 Mr. Esikoff spent 213 days in New York, 107 days in Florida, 33 days unknown, and 12 days in a location other than New York or Florida.

89. In their bill of particulars, petitioners stated:

Petitioners' number of days in and out of New York during 1990 is summarized in a document given to petitioners' representative, Frederick N. Bruckner, Esq., by the Audit Division entitled 'Analysis of Days In & Out of New York' for 1990 (the 'Analysis'), a copy of which was previously furnished by petitioners' representative to the Division of Taxation by letter dated September 19, 1997.

Petitioners reaffirm that the schedule of the number of days that petitioners claimed to be in New York is represented in each month's column 'PER T/P Places' and equals 129 days. (Exhibit "J", p. 2.)

90. At the hearing, petitioners relied upon a schedule prepared by Paula Molinaro showing that Mr. Esikoff spent 204 days outside of New York in 1990. An examination of this schedule reveals numerous unexplained discrepancies between the schedule prepared by Ms. Molinaro and

other exhibits in the record. Examples of the discrepancies follow:

(a) January - The schedule prepared by Ms. Molinaro does not identify any days in New York. The schedule adopted by petitioners at the time of the bill of particulars attributed 15 days as being in New York ( January 3<sup>rd</sup> through January 6<sup>th</sup> and January 15<sup>th</sup> through January 25<sup>th</sup>). Exhibit II shows a flight from LaGuardia to Miami on January 6<sup>th</sup> and a flight from Miami to LaGuardia on January 15<sup>th</sup>.

(b) February - The schedule prepared by Ms. Molinaro identifies only February 14<sup>th</sup> as a day in New York. In their bill of particulars, petitioners stated that February 5<sup>th</sup> through February 15<sup>th</sup> and February 23<sup>rd</sup> through February 26<sup>th</sup> were New York days. Exhibit II identifies a flight from LaGuardia to Miami on February 15<sup>th</sup>, a flight from Miami to LaGuardia on February 23<sup>rd</sup> and a flight from LaGuardia to Miami on February 26<sup>th</sup>.

(c) March - Ms. Molinaro's schedule selects two days (March 8<sup>th</sup> and March 11<sup>th</sup>) as days spent in New York. The schedule utilized by petitioners in their bill of particulars allocates 11 days to New York (March 5<sup>th</sup> through March 15<sup>th</sup>). Exhibit II shows a flight from Miami to LaGuardia on March 5<sup>th</sup>.

(d) April - Ms. Molinaro's schedule states that 4 days were spent in New York (April 5<sup>th</sup> and 6<sup>th</sup> and April 14<sup>th</sup> and 15<sup>th</sup>). In their bill of particulars, petitioners stated that 11 days were spent in New York (April 3<sup>rd</sup> through April 5<sup>th</sup>, April 10<sup>th</sup>, April 12<sup>th</sup>, April 23<sup>rd</sup> through April 27<sup>th</sup>, and April 30<sup>th</sup>). Petitioners stated that their whereabouts were unknown on an additional 12 days (April 6<sup>th</sup> through April 9<sup>th</sup>, April 11<sup>th</sup>, April 13<sup>th</sup> through April 15<sup>th</sup>, April 21<sup>st</sup> through April 22<sup>nd</sup> and April 28<sup>th</sup> through April 29<sup>th</sup>). An invoice from The Muttontown Club of East Norwich, New York shows that charges were incurred by Mr. Esikoff on April 7<sup>th</sup>, 8<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 27<sup>th</sup>, 28<sup>th</sup>, and 29<sup>th</sup>.

(e) May - The schedule prepared by Ms. Molinaro stated that petitioners were in New York on 5 days (May 1<sup>st</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, and 30<sup>th</sup>). Petitioners' bill of particulars stated that petitioners were in New York on 16 days (May 1<sup>st</sup> through May 4<sup>th</sup>, May 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup> through 17<sup>th</sup>, 22<sup>nd</sup> through 25<sup>th</sup> and May 31<sup>st</sup>). According to petitioners' bill of particulars, petitioners' whereabouts on May 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 18<sup>th</sup> through 21<sup>st</sup>, and 26<sup>th</sup> through 30<sup>th</sup> were unknown. An invoice from The Muttontown Club shows activity on May 3<sup>rd</sup> through May 6<sup>th</sup>, May 11<sup>th</sup> through May 13<sup>th</sup>, May 19<sup>th</sup>, 20<sup>th</sup>, 26<sup>th</sup>, and 27<sup>th</sup>.

(f) June - Ms. Molinaro's schedule states that Mr. Esikoff was in New York on three days ( June 1<sup>st</sup>, 6<sup>th</sup> and 30<sup>th</sup> ). The bill of particulars states that petitioners were in New York on June 1<sup>st</sup>, 5<sup>th</sup> through 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 19<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 26<sup>th</sup> and 29<sup>th</sup>. The bill of particulars also stated that petitioners whereabouts on the following days were unknown: June 2<sup>nd</sup> through June 4<sup>th</sup>, June 8<sup>th</sup> through June 10<sup>th</sup>, June 13<sup>th</sup>, June 15<sup>th</sup> through June 18<sup>th</sup>, June 20<sup>th</sup>, June 23<sup>rd</sup> through June 25<sup>th</sup>, June 27<sup>th</sup>, June 28<sup>th</sup> and June 30<sup>th</sup>. An invoice from The Muttontown Club shows that there was activity on June 1<sup>st</sup> through June 3<sup>rd</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 29<sup>th</sup>, and 30<sup>th</sup>.

(g) July - Ms. Molinaro's schedule states that Mr. Esikoff was in New York on four days (July 1<sup>st</sup>, 7<sup>th</sup>, 17<sup>th</sup>, and 25<sup>th</sup>). Petitioners' schedule in the bill of particulars states that petitioners were in New York on 16 days (July 2<sup>nd</sup> and 3<sup>rd</sup>, 9<sup>th</sup> through 13<sup>th</sup>, 18<sup>th</sup> through 20<sup>th</sup>, 23<sup>rd</sup> through 27<sup>th</sup> and 30<sup>th</sup>). The bill of particulars stated that petitioners' location on the following 11 days was unknown: July 1<sup>st</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 14<sup>th</sup> through 17<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 28<sup>th</sup> and 29<sup>th</sup>. An invoice from The Muttontown Club shows that there was activity at the club on July 1<sup>st</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 26<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup>.

(h) August - Ms. Molinaro's schedule states that petitioners spent six days in New York (August 12<sup>th</sup>, 21<sup>st</sup>, 25<sup>th</sup>, 28<sup>th</sup>, 30<sup>th</sup>, and 31<sup>st</sup>). Petitioners' bill of particulars states that petitioners



were in New York in August on the following 11 days: August 7<sup>th</sup> through August 9<sup>th</sup>, August 16<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 23<sup>rd</sup>, 28<sup>th</sup>, 30<sup>th</sup>, and 31<sup>st</sup>. It also states that petitioners' whereabouts on the following days are unknown: August 10<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 22<sup>nd</sup>, 24<sup>th</sup> through 27<sup>th</sup> and 29<sup>th</sup>. The August invoice from The Muttontown Club shows activity on August 11<sup>th</sup>, 12<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup>.

(i) September - Ms. Molinaro's schedule states that petitioners spent five days in New York (September 1<sup>st</sup>, 15<sup>th</sup>, 18<sup>th</sup>, 21<sup>st</sup>, and 27<sup>th</sup>). Petitioners' bill of particulars states that petitioners were in New York on September 17<sup>th</sup> through September 19<sup>th</sup>, September 24<sup>th</sup> and September 25<sup>th</sup>. The bill of particulars also states that petitioners' whereabouts were unknown on 14 days - September 1<sup>st</sup>, 2<sup>nd</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 20<sup>th</sup> through 23<sup>rd</sup>, and 26<sup>th</sup> through 30<sup>th</sup>. An invoice from The Muttontown Club for September show activity on September 1<sup>st</sup>, 2<sup>nd</sup>, 19<sup>th</sup>, 23<sup>rd</sup> and 30<sup>th</sup>. An invoice from Jeffrey's World of Travel shows that there was a flight from LaGuardia to Miami on September 4<sup>th</sup> and a return flight from Miami to LaGuardia on September 14<sup>th</sup>. Documents in the record show that there were purchases by American Express card in New York on September 15<sup>th</sup>, 21<sup>st</sup>, and 23<sup>rd</sup>.

(j) October - Ms. Molinaro's schedule states that petitioners spent four days in New York (October 3<sup>rd</sup>, 6<sup>th</sup>, 23<sup>rd</sup>, and 26<sup>th</sup>). Petitioners' bill of particulars lists nine New York days (October 2<sup>nd</sup>, 3<sup>rd</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 22<sup>nd</sup>, 24<sup>th</sup> through 26<sup>th</sup> and 29<sup>th</sup>). The bill of particulars further states that petitioners' whereabouts were unknown on October 1<sup>st</sup>, 4<sup>th</sup> through 7<sup>th</sup>, 23<sup>rd</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 30<sup>th</sup>, and 31<sup>st</sup> and that petitioners were in Florida on October 10<sup>th</sup> through October 21<sup>st</sup>. The October invoice from The Muttontown Club shows activity on October 6<sup>th</sup>, 7<sup>th</sup>, 18<sup>th</sup> and 28<sup>th</sup>. Invoices from Jeffrey's World of Travel Ltd. show that on October 10<sup>th</sup> there was a flight from LaGuardia to Miami and on October 14<sup>th</sup> there was a flight from Miami to LaGuardia. On October 16<sup>th</sup> there

was a flight from LaGuardia to Miami and on October 22 there was a flight from Miami to LaGuardia. On October 23<sup>rd</sup>, Mr. Esikoff made a purchase with an American Express credit card in Flushing, New York.

(k) November - Ms. Molinaro's schedule does not list any New York days. Petitioners' bill of particulars sets forth as New York days November 1<sup>st</sup>, 12<sup>th</sup> through 16<sup>th</sup> and 19<sup>th</sup>. The bill of particulars stated that the following days were spent in Florida: 2<sup>nd</sup> through 6<sup>th</sup>, 8<sup>th</sup>, and 20<sup>th</sup> through 30<sup>th</sup>. Petitioners also stated that their whereabouts were unknown on November 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup>. The November invoice from The Muttontown Club shows activity on November 17<sup>th</sup>. Exhibit II shows that there was a flight from LaGuardia to Miami on November 2<sup>nd</sup> and a flight and a flight from LaGuardia to Miami on November 5<sup>th</sup>. There was also a flight from Miami to LaGuardia on November 12<sup>th</sup>. Exhibit 37 shows that there was a flight from LaGuardia to Miami on November 20<sup>th</sup>. On November 19<sup>th</sup>, Mr. Esikoff wrote a check payable to the order of cash on his personal account at Chase Manhattan Bank, N.A. in Flushing, New York. The back of the check indicates that the check was cashed in New York on November 20<sup>th</sup>.

(l) December - Ms. Molinaro's schedule does not list any New York days. Petitioners' bill of particulars lists only December 4<sup>th</sup> as a New York day. According to the bill of particulars, all of the remaining days of the month were Florida days. On December 6<sup>th</sup>, Mr. Esikoff cashed a \$1,500.00 check on his personal account at Chase Manhattan Bank, N.A. in Flushing, New York.

91. Ms. Molinaro's schedule allocated three days each month in 1990 to New Jersey except for December wherein each day was allocated to Florida. Petitioners' bill of particulars allocated a total of 12 days in 1990 to a location other than New York, Florida and "unknown." Of the 12 days, 7 occurred in January, 3 were in April and the remaining 2 were in July.

***Bond Interest***

92. At the hearing, petitioners' representative withdrew petitioners' protest of the inclusion of tax exempt municipal bond interest in 1989 based upon adjustments made by the Conciliation Conferee (Tr. pp. 18-19). For the following year, petitioners presented a schedule which showed that of the of \$139,668.59 total tax exempt interest received in 1990, \$34,893.15 was interest from New York State and municipal bonds. The Division agreed that the amount shown on the schedule as interest from New York State and municipal bond interest was not subject to tax.

***Penalties***

93. Penalties were assessed in the year 1989 pursuant to Tax Law § 685(b) for negligence and Tax Law § 685(p) for substantial understatement of liability because there was no response on Mr. Esikoff's personal income tax return to the question of whether Mr. Esikoff maintained living quarters in New York State. The same penalties were assessed for the year 1990 because the foregoing question was answered by checking the "No" box. The "No" was checked because the trust pays all the expenses of the apartment and petitioners believe that all Mr. Esikoff does is make gifts to the trust subject to the \$10,000.00 annual exclusion.

94. Mr. Esikoff has been using an accountant to prepare his personal income tax returns since 1947. The accounting firm acquired the information and documents to prepare Mr. Esikoff's personal income tax returns from Paula Molinaro. Mr. Esikoff stated that he just signed the return because he depended on the professionals he hired to gather the correct information and prepare an accurate return. If a balance was due, he wrote a check. If a refund was due from New York, Mr. Esikoff either obtained the refund or transferred the balance to another year. If this question had not been brought to his attention, he would not have read that

sentence and would not have known whether to check a yes or no. He was not aware that question E on the 1990 return was checked “No.”

***SUMMARY OF THE PARTIES' POSITIONS***

95. Petitioners maintain that Mr. Esikoff complied with Florida’s legal requirements for establishing a domicile. In support of this argument, petitioners note that Mr. Esikoff executed a declaration of Florida domicile, filed Florida intangible tax returns, registered to vote in Florida, obtained a Florida homestead exemption, and registered their automobiles in Florida. Petitioners submit that Mr. Esikoff’s business holdings consisted almost exclusively of rental real estate. According to petitioners, Mr. Esikoff was not capable of performing personal services at age 70 and that he had an office staff to administer his holdings. Business checks were dated a few days before they were cashed in order to insure that the checks could not be cashed before the income was deposited into Mr. Esikoff’s business account. Petitioners’ representative argues that although Ms. Molinaro handled everything for him, Mr. Esikoff insisted on signing all checks as a security practice.

At the hearing, petitioners’ representative maintained that since the Florida driver’s licenses were valid only in the State of Florida, it was necessary for Mr. Esikoff to obtain a license that was valid in the State of New York. Mr. Esikoff submits that he had to maintain a New York driver’s license because his Florida license was restricted. He stopped renewing his New York license when the restriction was taken off the Florida license.

Petitioners also note that neither the Schedule K-1’s nor the Forms 1099 used the 12 Bond Street address. Moreover, petitioners did not use the 12 Bond Street address on any other tax form.

Petitioners submit that the reason that the utility use in Florida appears to be low in

relation to the number of days which petitioners claimed to be in Florida is that from approximately September 1987 until October 1989, Mr. Esikoff lived primarily with Helen Reid in her apartment in Miami Beach at 5600 Collins Avenue and only infrequently at his condominium at 3440 South Ocean Drive in Palm Beach, Florida.

With respect to the circumstances surrounding the death of his first wife, petitioners state that she was initially returned to New York because it was in the summertime. Moreover, after Freda Esikoff died, Mr. Esikoff began living with his future second wife, Helen Reid.

Petitioners also argue that in 1989, Helen Reid was 79 years old and had previously severed all ties with New York years earlier. It is submitted that Helen Reid was clearly a Florida domiciliary.

Petitioners maintain that after the conveyance of the Great Neck condominium, the Freda Esikoff Family Trust paid for the condominium's upkeep. It is submitted that Mr. Esikoff wanted to change his domicile to Florida because of the difference in the weather, he had a lot of friends and a nice home in Florida and because he wished to minimize his tax exposure.

96. In regard to the statutory residence issue, petitioners argue that the letters from various individuals regarding the time that Mr. Esikoff spent in New York should be given substantial weight in resolving this issue.

97. Petitioners posit that penalties should be abated because it was the accounting firm which failed to answer the question regarding whether a residence was maintained in New York in 1989 and which took the position that Mr. Esikoff did not maintain a New York residence in 1990. After the conveyance, the trust paid for the condominium's upkeep. It is submitted that Mr. Esikoff was unaware that the question of whether he maintained a residence in New York was answered no.

98. Petitioners contend that there were a number of problems with the way the audit was conducted. Mr. Esikoff believes that the auditors were biased and that they went to places and took actions which were an invasion of privacy. Petitioners submit that they were damaged because an auditor asked third parties for information without first asking petitioners. Moreover, it is asserted that documents were not returned in the order they were presented to the Division.

99. In its brief, the Division argues that petitioners were residents of New York State because of their failure to meet their burden of proving by clear and convincing evidence that Mr. Esikoff in 1989 and both petitioners in 1990 moved to Florida with the bona fide intention of making Florida their fixed and permanent home. In this regard, the Division posits that Mr. Esikoff was actively engaged in the management of his businesses. The Division further contends that the travel and entertainment deductions claimed by Mr. Esikoff on his New York income tax return for 1989 is evidence of active business ties to New York and support the conclusion that there was a failure to abandon the New York domicile.

100. The Division next argues that petitioners failed to establish that they did not spend, in the aggregate, more than 183 days within New York State during each of the years in issue. In this regard, the Division states that it is far from conclusive that a 1989 diary ever existed and submits that it is “disingenuous of Mr. Bruckner to attempt to explain its absence from the record by accusing the Division of losing it.” (Division’s brief, p. 13.) It is noted that petitioners did not place the diary for 1990 in evidence.

101. With respect to the issue pertaining to the tax due on municipal bonds for the year 1990, the Division states that petitioners:

placed into evidence as exhibit 39 a schedule showing that of the \$139,668.00 in interest earned on state and municipal bonds for 1990, \$34,893.00 was earned on New York [S]tate and local bonds. That leaves interest in the amount of

\$104,775.00 earned from non New York [S]tate and municipal bonds that remain subject to tax. (Division's brief, p.17.)

102. The Division contends that the failure to reveal the maintenance of living quarters in New York State is a basis for imposing a negligence penalty. The Division further posits that there is a basis for imposing the substantial underpayment penalty because the amount of the understatement exceeds the greater of 10 percent of the amount required to be reported on the return or \$2,000.00.

103. In their reply brief, petitioners assert that they did not maintain the Great Neck condominium or pay its expenses; that the value of the Great Neck condominium at the time of its transfer to the trust was \$550,000.00 and not \$669,000.00; that J. Royal Parker Associates, Inc. operates primarily, if not exclusively, in New Jersey; that Mr. Esikoff changed his domicile for legal purposes earlier than he did for tax purposes; that it is not relevant that Mr. Esikoff maintained a New York drivers license; that petitioners believe that \$111,812.00 of tax-exempt bond interest was erroneously included in Mr. Esikoff's income for 1989; that the Division lost petitioners' diary and worksheet for 1989; that Mr. Esikoff's rental operations should be viewed as a passive activity with respect to the question of domicile regardless of the fact that for Federal income tax purposes he satisfied the requirements of "active participation" with respect to Highland Care Center; and that petitioners have shown reasonable cause to avoid the imposition of penalties.

### **CONCLUSIONS OF LAW**

A. Tax Law § 601 imposes New York State personal income tax on "resident individuals." In turn, Tax Law § 605(b) defines resident individual, in pertinent part, as follows:

(1) Resident individual. A resident individual means an individual:

(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

B. While there is no definition of "domicile" in the Tax Law the Division's regulations (20 NYCRR former 102.2[d]) provided, in pertinent part:

(d) *Domicile.* (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

(3) Domicile is not dependent on citizenship; that is, an immigrant who has permanently established his home in New York State is domiciled here regardless of whether he has become a United States citizen or has applied for citizenship. However, a United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly shown that he intends to remain there permanently . . .

(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere.

Permanent place of abode is defined in the regulations at 20 NYCRR former 102.2(e)(1)



as:

a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse.

C. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (*Matter of Minsky v. Tully*, 78 AD2d 955, 433 NYS2d 276). Both the requisite intent as well as the actual residence at the new location must be present (*id*). The concept of intent was addressed by the Court of Appeals in *Matter of Newcomb* (192 NY 238, 250-251):

Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals . . . . In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time, does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect . . . . Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile . . . . There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration . . . . [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention . . . . No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The *animus manendi* must be actual with no *animo revertendi*. . . .

This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice.

D. The test of intent with respect to a purported new domicile has been stated as “whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it” (*Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138, 140, *citing Matter of Bourne*, 181 Misc 238, 246, 41 NYS2d 336, 343). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (*Matter of Zinn v. Tully*, 54 NY2d 713, 442 NYS2d 990). Declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (*see, Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, citing *Matter of Trowbridge*, 266 NY 283, 289). A taxpayer may change his or her domicile without severing all ties with New York State (*see, e.g., Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990).

E. As is evident from the cases cited above, in determining an individual's domicile, the facts and circumstances of the particular case are paramount. As stated in *Matter of Silverman* (*supra*), while certain declarations may evidence a change of domicile, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life." A physical move to another place in which a permanent residence is established does not necessarily provide the clear and convincing evidence of an intent to change one's domicile (*Matter of Zinn v. Tully, supra*). Only when coupled with the clear intent to change one's domicile does the fact of a changed residence become a true changed domicile.

F. The first question presented is whether petitioners established that they intended to

change their domicile from New York to Florida. The record shows that there have been formal declarations which support Mr. Esikoff's claim that he intended to change his domicile to Florida. Such declarations are present in Mr. Esikoff's will, the United States Estate (and Generation-Skipping Transfer) Tax Return for Freda Esikoff, the Florida Declaration of Domicile and the marriage certificate evidencing Mr. Esikoff's marriage to Helen Reid.

Mr. Esikoff's "habit of life," however, presents a different picture. Despite petitioners' assertions to the contrary, the record shows that during the years in issue Mr. Esikoff maintained very close control over his business interests in New York. The fact that Mr. Esikoff's signature was required on all of the checks drawn on the account of Realty Unlimited shows that his businesses could not take any action without his approval. Mr. Esikoff's active control of his business interests in New York is further demonstrated by the fact that he had his own desk at the office of Realty Unlimited and by the December 6, 1990 letter of Ms. Molinaro which stated that Mr. Esikoff was in the office an average of five to six days a month.

In support of their position, petitioners have strenuously argued that Mr. Esikoff's business activities in New York were passive relying upon Jennings and Bolar, *Passive Activity Loss Rules*. This argument is misplaced. The question here is not whether certain losses can be offset against certain income. The question is whether petitioners had the intent to establish a new domicile. In resolving this question, an individual's active participation in the daily operations of a business in New York is regarded as evidence of an intent to maintain a New York domicile (*Matter of Kartiganer*, Tax Appeals Tribunal, October 17, 1991, *confirmed Matter of Kartiganer v. Koenig*, 194 AD2d 879, 599 NYS2d 312; *Matter of Clute v. Chu*, 106 AD2d 841, 484 NYS2d 239; *see also, Matter of Smith*, Tax Appeals Tribunal, July 23, 1998). Here, the fact that Mr. Esikoff maintained complete control over all of the disbursements shows

that he actively participated in the daily operations of the business and that he did not intend to abandon this connection to New York.

Mr. Esikoff asserted that he did not have any particular attachment to the condominium at 12 Bond Street, Great Neck, New York. The facts in the record belie this contention. First, this was Mr. Esikoff's home with his first wife Freda Esikoff. He has lived there since at least 1980. Belatedly, petitioners acknowledged during the audit that this was where they stayed when they were in New York. It is very significant that Mr. Esikoff chose to keep numerous pieces of valuable art work at the 12 Bond Street residence. As stated earlier, the test of intent with respect to changing one's domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (*Matter of Bodfish v. Gallman, supra*, 378 NYS2d at 140).

It is recognized that although Mr. Esikoff joined country clubs in Florida, had bank accounts in Florida, executed a will and a codicil listing a Florida domicile, obtained Florida driver's licenses and filed Florida tax returns, was treated by physicians in Florida, received mail in Florida, and had friends in Florida, these factors are not dispositive (*see, Matter of Kartiganer v. Koenig, supra*, 194 AD2d 879, 599 NYS2d 312). Moreover, they are counterbalanced by those factors showing an intent to remain a domiciliary of New York. Among other things, Mr. Esikoff maintained a telephone listing and personal bank account in New York, received mail and tax documents in New York, was an active member of a club in New York, had friends in New York, was treated by physicians in New York and had New York driver's licenses. In sum, petitioners have not clearly established that they intended to change their domicile from New York to Florida.

G. Petitioners' claim that Mr. Esikoff did not maintain a place of abode in New York is

completely specious. In *Matter of Evans* (Tax Appeals Tribunal, June 18, 1992, *confirmed* 199 AD2d 840, 606 NYS2d 404) the Tribunal held that “one maintains a place of abode by doing whatever is necessary to continue one’s living arrangements in a particular dwelling place.” There is no dispute that Mr. Esikoff provided funds to a trust which used the money to maintain a residence which he and his wife utilized when they were in New York. The substance of this arrangement was that Mr. Esikoff was maintaining a residence in New York and a finding to the contrary would defeat the intention of the Legislature as expressed in Tax Law § 605.

H. The next question presented is whether petitioners established the number of days spent in New York State during the years in issue. At the hearing, petitioners did not present any evidence of the number of days in New York in 1989 and asserted that the diary for 1989 was given to the Division and never returned.

I. Petitioners’ assertion that there was a diary for 1989 which was lost by the Division is rejected. The Division’s audit report states that a diary for 1989 was not presented and the only evidence offered by petitioners to contradict this statement was speculation that such a diary must have existed because it was not referred to in the list of items missing from the letter of December 24, 1993. In his testimony Mr. Bruckner explained:

I can only surmise, because I don’t have a perfectly accurate recollection, all I have is in reviewing the record, that it seems that it was submitted. It seems clear that it was no longer asked for and I just don’t have it. So it is very peculiar that this document is no longer in my possession and it was asked for by the state in its demand for a bill of particulars. I can’t supply it because I don’t have it. (Tr., p. 225.)

At the hearing Mr. Esikoff could not recall whether he kept a diary for 1989. (Tr. p. 431.)

J. On the basis of the foregoing, petitioners’ assertion that the 1989 diary was lost by the Division is rejected because there is no evidence to support the claim. It is further concluded that

the Division's finding that petitioners spent 188 days in New York in 1989 is accepted since no evidence has been offered to challenge this conclusion.

K. For the year 1990, petitioners relied upon a schedule prepared by Ms. Molinaro. No explanation was offered why petitioners did not rely upon their diary for 1990 which was unquestionably given to the Division during the audit. However, regardless of the reason why the 1990 diary was not presented into evidence, it is clear that Ms. Molinaro's schedule is contradicted by other documents offered by petitioners and is unreliable (*see*, Finding of Fact "90" and "91"). Therefore, in the absence of any reliable evidence to the contrary, the Division's conclusion that petitioners spent 213 days in New York in 1990 is accepted. In view of the foregoing, the Division's assertion that there are additional New York days is rendered moot.

L. Since Mr. Esikoff was domiciled in New York, maintained a permanent place of abode in New York and spent in the aggregate more than 30 days of the taxable year in New York, Mr. Esikoff is subject to tax as a resident individual in 1989 and Mr. and Mrs. Esikoff are subject to tax as resident individuals in 1990.

M. At the hearing, petitioners' representative withdrew petitioners' protest of the inclusion of tax exempt municipal bond interest in 1989 on the basis of adjustments made by the conciliation conferee (tr. pp. 18-19). Presumably, this is the reason why no additional evidence was offered on this point. In their reply brief, petitioners' representative objected to the statement in the Division's brief that the tax on bond interest was resolved by the conciliation conferee and stated "petitioners believe that the amount of \$111,812.00 was erroneously included in Mr. Esikoff's income in 1989 and same should be removed." (Petitioners' reply brief, p. 5.) Since this point was conceded by petitioners at the hearing, this argument is rejected.

N. For the year 1990, petitioners presented a schedule which showed that of the total tax

exempt interest received in 1990 of \$139,668.59, \$34,893.15 was tax exempt interest on New York State and municipal bonds. In its brief, the Division conceded the accuracy of this schedule and therefore the adjustment sought by petitioners for 1990 is accepted by consent .

O. In support of their position that penalties should be abated, petitioners argue that it was Mr. Esikoff's accounting firm which failed to answer the question of whether a residence was maintained in New York in 1989 and that he was unaware that the question of whether he maintained a residence in New York was answered in the negative for 1990. In considering the argument that the taxpayer did everything that he could to ensure compliance with the tax law by hiring a particular accounting firm, the Tribunal in *Matter of McGaughey* (Tax Appeals Tribunal, March 19, 1998) stated:

It is a well-settled principle that each taxpayer has a nondelegable duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause (*see, Logan Lumber Co. v. Commissioner*, 365 F2d 846; *see also, Sanderling, Inc. v. Commissioner*, 571 F2d 174).

In making a determination as to whether reasonable cause exists when a taxpayer has relied on the advice of a professional, it must be shown that the taxpayer relied in good faith on the advice he received and it must have been "reasonable" for the taxpayer to rely upon the particular advice he was given (*see, LT & B Realty Corp. v. New York State Tax Commn.*, 141 AD2d 185, 535 NYS2d 121). When determining whether the taxpayer has shown that his reliance was reasonable, the burden is on the taxpayer to demonstrate that he acted with ordinary business care and prudence in attempting to ascertain his liability, if any, for taxes (*see, United States v. Boyle*, 469 US 241; *Matter of Koether, supra*).

P. In this case, it appears that Mr. Esikoff simply absolved himself of his tax obligations. Rather than showing that there was reasonable cause for the abatement of penalties, the argument that Mr. Esikoff did not know what was on his tax return supports the conclusion that Mr. Esikoff did not act with ordinary business care and prudence. Moreover, Mr. Esikoff was

providing the funds which paid the expenses of the apartment. He had the benefit of the use of the apartment throughout the year. Accepting the argument that Mr. Esikoff did not maintain a residence in New York State is unreasonable because it would require one to overlook Mr. Esikoff's true living arrangements. Accordingly, petitioners have not established reasonable cause warranting the abatement of penalties.

Q. The Division of Tax Appeals' responsibility, pursuant to Tax Law § 2000, is to provide:

the public with a just system of resolving controversies with such department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies. The division shall be responsible for processing and reviewing petitions, providing hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter, rendering determinations and decisions and all other matters relating to the administration of the administrative hearing process. The administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person a right to a hearing under this chapter (Tax Law § 2000).

Since there is no evidence that the alleged misconduct by the auditor affected the amount of tax asserted to be due, consideration of the asserted improper conduct is outside the purview of the Division of Tax Appeals.

R. The petitions of Sidney Esikoff and Helen Esikoff are denied and the notices of deficiency, dated October 7, 1994, are sustained together with such penalty and interest as may be lawfully due.

DATED: Troy, New York  
June 10, 1999

/s/ Arthur S. Bray



ADMINISTRATIVE LAW JUDGE